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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET No. 60

~~72-60~~

MARTIN ERDMANN,

Petitioner,

v.

HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPPERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as clerk of the said Appellate Division,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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HAROLD A. STEVENS; JAMES B. M. MCNALLY; ARON STEUER; SAMUEL W. EAGER; GEORGE TILZER; LOUIS J. CAPOZZOLI; OWEN MCGIVERN; EMILIO NUNEZ; ARTHUR MARKEWICH; THEODORE R. KUPPERMAN; Justices of the Appellate Division, First Department, individually and in their capacity as administrators concerning the conduct of members of the New York Bar; and HYMAN W. GAMSO, individually and in his capacity as clerk of the said Appellate Division,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents oppose the granting of petitioner's application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Questions Presented

1. Whether a federal court should intervene in a state bar disciplinary proceeding to prevent its prosecution simply because the petitioner asserts that he will be "chilled" in the exercise of his First Amendment rights by being compelled to assert those rights as a defense in the disciplinary proceeding.

2. Whether this Court should grant this petition when the petitioner has available to him the right to appeal to the New York Court of Appeals from the June 27, 1972 order of the New York, Appellate Division, Third Department censuring him upon a finding (by a divided court) that "the intemperate, vulgar and insulting language • • • concededly used by respondent [petitioner] is an offense against the dignity and the integrity of the courts and tends to create disrespect for judicial officers generally thereby lessening public confidence in our legal system" (23a).

Statement of the Case

(1)

Plaintiff, a member of the New York Bar, was served on June 9, 1971 with a petition and charges in a professional disciplinary proceeding instituted by the Appellate Division, First Department (29a). Plaintiff was originally notified to answer the charges on June 30, 1971, but the time for him to respond was extended to September 30, 1971 (Pet., p. 6; 30a).

On September 24, 1970, plaintiff obtained an order directing the defendants to show cause before the District Court on September 28, 1970 why the state court disciplinary proceedings should not be enjoined (Pet., p. 6; 17a). The plaintiff's motion was based upon affidavits,

some of which were annexed to the order to show cause and some of which were served in Court on September 28, 1971 (Pet., p. 7; and see original District Court papers).

On September 28, 1971, the defendants moved to dismiss the complaint in this action by reason of the District Court's lack of jurisdiction over the subject matter (a state court disciplinary proceeding), its lack of jurisdiction over the "persons" of the defendants (the New York Appellate Division, First Department) within the meaning of the Civil Rights provisions invoked by the plaintiff; and by reason of the plaintiff's failure to state a claim upon which relief could be granted (17a).

(2)

An application made to the District Court for a stay of the state court proceeding was denied by District Judge Croake. He had signed the September 24, 1971 order to show cause, but deleted the paragraphs therein by which plaintiff proposed, pending the hearing of his motion, to stay the state court disciplinary proceeding. (See original District Court order on file, not completely reproduced even in petitioner's Court of Appeals appendix; cf. 27a, 28a).

A further application for such a stay was also denied on September 28, 1971, by District Judge Sylvester J. Ryan, upon the oral argument of the motion for a temporary injunction and the cross-motion to dismiss.

The plaintiff appealed to the Court of Appeals from the denial of its application for a temporary stay, and renewed such application for a stay pending a disposition of plaintiff's appeal to that Court. Oral argument on such application was held on September 30, 1971 before a panel of that Court, comprised of Judges Mansfield, Lumbard and Oakes. The application to that Court for a stay was unanimously denied from the bench.

(3)

The charges in the disciplinary proceedings were predicated, in part, upon statements attributed to plaintiff published in a Life article critical of New York trial judges. The plaintiff was charged with stating (32a):

> "And Appellate Division judges aren't any better. They're the whores who became madams."

The charges informed the plaintiff that after the filing of Erdmann's answer to the charges, the disciplinary proceeding would be transferred to an Appellate Division in another Department (See Appellate Division order to show cause, dated June 8, 1971, signed by the Clerk of the Court, at its direction (30a)).

The charges did not seek to stop Erdmann from exercising his right to appear, in the future, before any forum or discussion group. They dealt primarily with Erdmann's past conduct, the nature of his accusations against the state judiciary, and whether the statements he had allegedly made, in the past, were of the temperate and dignified nature which professional standards require (31a-37a).

(4)

District Judge Ryan, by an order entered October 1, 1971 (17a-19a) dismissed the complaint on the merits by reason of the District Court's lack of jurisdiction over the defendants because it was clear to him that the defendants, although named individually, were being sued on claims which arose "from their official action as a judicial body in the exercise of their powers and duties under the Judiciary Law as part of the Judicial System of the State of New York." He described the naming of the defendants individually as "an obvious maneuver" to avoid the holding of the Second Circuit in *Zuckerman* v. *Appellate Division, Second Department*, 421 F. 2d 625 (2nd Cir., 1970).

He further noted that since the action complained of had been taken by the judges "in their official capacity", they were immune from suit "to the same extent as when they are deciding a case in a judicial proceeding" (18a). Judge Ryan concluded by observing that the Appellate Division's jurisdiction was "exclusive and controlling" under the New York Judiciary Law; and by restating his holding that the District Court had no jurisdiction under Title 42 U.S.C.A. § 1983 (18a).

(5)

The United States Court of Appeals unanimously affirmed the District Court's dismissal of this suit. Although the Court's opinion rejected Judge Ryan's holding that a civil rights action could not be maintained against the Appellate Division "as a body" because the Justices and the Clerk had been sued as "individuals", the Court of Appeals did hold that because of the strong "comity" policy expressed in the sextet of cases headed by *Younger* v. *Harris*, 401 U.S. 37 (1971), it should not intervene to disrupt or subvert legitimate state prosecutions in which constitutional issues could be resolved by competent state trial and appellate tribunals (5a-6a).

The Court of Appeals rejected petitioner's contention that the Appellate Division, in conducting disciplinary proceedings against him, was acting not in a judicial but in an administrative capacity (6a-8a). On the subject of whether the principles of *Younger* applied equally to a "civil suit", it did not "face that issue", since it viewed a court's disciplinary proceeding against a member of its bar to be "comparable to a criminal rather than to a civil proceeding" (8a), citing *In re Rufalo*, 394 U.S. 544, 561 (8a). And it emphasized the unfair and unnecessary blow to a state court's "integrity and effectiveness" which it would suffer if subjected to "the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer" (9a).

Furthermore, it was pointed out that petitioner's "important constitutional claims would be assured of review, if necessary, by the New York Court of Appeals" (12a).

Circuit Judge Lumbard, in a concurring opinion, recognized that the series of cases, including *Younger* v. *Harris* (*supra*) in which this Court had "reaffirmed the vitality of the comity doctrine" had involved State criminal proceedings, but concluded that "when state courts do initiate an inquiry into an attorney's conduct, they deal with a matter of such great importance to the State and its citizens that federal courts should be as slow to intervene in these proceedings as in state criminal proceedings" (14a). With relation to the "bad faith" charged against the Appellate Division by petitioner because it had not accepted a Grievance Committee recommendation, Judge Lumbard noted that it was the judges, not the committee, which had the responsibility under N.Y. Jud. Law, § 90, of "deciding whether to begin disciplinary proceedings". Since petitioner had failed to make allegations sufficient to warrant federal injunctive relief, Judge Lumbard agreed that the complaint in this action had properly been dismissed (12a-16a).

ARGUMENT

The Court of Appeals correctly held that the District Court should not exercise its jurisdiction to halt a State Court disciplinary proceeding validly instituted in the exercise of the Appellate Division's statutory power over the members of its Bar.

(1)

Since the beginning of this country's history, Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts. This fact was explicitly recognized by

Justice Black at the outset of his landmark opinion in *Younger* v. *Harris*, 401 U.S. 37, 43 (1971). This statement was not restricted to criminal prosecutions, although the *Younger* case involved an attempt to halt such a proscution.

This is not a case like that distinguished in the *Younger* case where a substantial loss of or impairment of freedoms of expression will occur if Mr. Erdman must await the state court's disposition and ultimate review in the Supreme Court of any adverse determination. Although in *Dombrowski* v. *Pfister*, 380 U.S. 479 [1965], threats of a series of prosecutions to harass Dombrowski were held to be subject to restraint, Mr. Justice Black distinguished Dombrowski from "a single prosecution brought in good faith" (401 U.S., at p. 48). See also *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); and *Perez* v. *Ledesma*, 401 U.S. 82, 83-85 (1971). Moreover, a federal injunction against state court proceedings, otherwise proper, must be based on one of the specific statutory exceptions to 28 U.S.C. § 2283. None of those exceptions is applicable here. *Atlantic C.L.R. Co.* v. *Engineers*, 398 U.S. 281 (1970).

Petitioner has sought to give this Court the impression that he has been subjected to "repeated" prosecutions by the Appellate Division. But that is not the fact. The Court instituted but a *single proceeding* on its own initiative, after it had determined *not* to follow the recommendation (7a, 8a) of the Bar Association Grievance Committee *not* to institute such a proceeding. Patently, the committee's recommendation, however persuasive, could not divest the Court of its power to make what it deemed to be the appropriate decision on the subject of whether petitioner should be charged with unprofessional conduct (15a). The fact remains that only a *single* proceeding was instituted against petitioner. He cannot eke "repetition" out of the mere circumstance that a Bar Committee's recommendation not to prosecute was rejected by the Appellate Division.

(2)

There was no showing of irreparable injury in the allegations either of the complaint or of the papers submitted in support of the temporary injunction application. *Dyson v. Stein,* 401 U.S. 200 (1971). Plaintiff's allegation that he has declined invitations to speak or participate in forums by reason of the pendency of the state proceeding is a self-serving bugbear type of statement. The state courts as well as the federal courts are subject to constant criticisms and plaintiff might just as well participate in such criticism as anyone else. Plaintiff, however, like any other member of the Bar, may reasonably be expected to adhere to professional standards in making such criticism. He also should be expected to account for any future, as well as past, statements which may deviate from professional standards in making such criticism.

(3)

Free speech does not give a lawyer the right to openly denigrate a court in the eyes of the public. *In re Maestretti,* 30 Nev. 187, 93 F. 1004 (1908); *In re Breen,* 30 Nev. 164, 93F. 997 (1908); *In re Raggio,* 487 P. 2d 499 (1971). In the per curiam opinion of the Nevada Supreme Court, it was held, in the last case (pp. 500-501):

> "The inner motivation which caused Mr. Raggio to speak out in such intemperate fashion is unknown to us and we shall not indulge in presumptions or inferences adverse to him. We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves. A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold. Conformity

with those standards has proven essential to the administration of justice in our courts. Mr. Raggio offended them, and, as recommended by the Board of Governors, we reprimand him therefor."

We do not propose to conjecture what the ultimate disposition of the disciplinary proceeding will be. The First Amendment issue has implicitly been decided against petitioner by the Third Department; but his petition here does not indicate that he has prosecuted an appeal to the New York Court of Appeals.

When this case was before the District Court, Erdmann had not even sought to put in an answer to the charges against him. The First Department, with admirable restraint, indicated that since it had preferred the charges against Erdmann, it would transfer their disposition to another Department so that it would not be acting both as "prosecutor" and judge of the charges.

The defendants herein, by transfer of the disciplinary proceeding, sought to avoid any complaint by plaintiff that prosecuting and adjudicating functions had been improperly vested in the same person or agency. Even had not that been done, there would have been no basis for *federal* interference in the State proceeding. But defendants did, with great sensitivity to plaintiff's rights, direct such a separation. And he is still not deprived of the opportunity to raise any question of bias or interest (which he may deem tenable) before the New York Court of Appeals. Even *In re Murchison,* 349 U.S. 133 (1955), contempt charges which had been preferred by the same judge as a "one-man grand jury" recognized that "interest cannot be defined with precision"; and that "Circumstances and relationships must be considered" (349 U.S., at p. 136). Clearly, the circumstances and relationships here are quite different. See *Ungar* v. *Sarafite,* 376 U.S. 575, 583-588 (1964).

(4)

Moreover, complete review of any state court disposition of the charges may be had not only in the State Court of Appeals, but also in the United States Supreme Court. *Matter of Willner* v. *Committee on Character and Fitness,* 373 U.S. 96 (1963); *Spevack* v. *Klein,* 385 U.S. 15 (1967). There is no reason to assume that plaintiff's constitutional rights will not be protected in the state court proceedings, or that, if ultimate review of any state court disposiiton of the charges becomes necessary, he will be prejudiced by reaching the Supreme Court through the state court route. There is no reason for this Court now to assume that plaintiff would be foreclosed from enforcing his First Amendment rights by the New York Court of Appeals. See *Chestmut* v. *People of the State of New York,* 370 F. 2d 1 (2d Cir. 1966, Lumbard, Ch. J., Medina and Kaufman, JJ.).

Petitioner's continued insistence (cf. 11a-12a) that the New York Court of Appeals is restricted in the scope of its review; and that he should not be compelled to "face the prospect of having to appeal the decision [of the Appellate Division to censure him] to the New York Court of Appeals should carry little weight with this Court.

He has been subjected to the *minimum* punishment of "censure"; and the Court of Appeals *jurisdiction* to review the *legality* of the Third Department's finding that he was "guilty of unprofessional conduct" cannot be successfully questioned. The Attorney General certainly will not dispute the petitioner's right to have the Third Department order reviewed by the New York Court of Appeals.

Nor will the Attorney General question the right to have presented to that Court either petitioner's First Amendment contentions or his more recent argument (pp. 12-13, 19) that he was entitled to have a "hearing" by the Third Department in the charges presented against him. For present purposes, we may note simply that the record here

presented by petitioner does not show that, when confronted with the motion for summary judgment made by the New York County Lawyers' representative (Daniel M. Shientag) on behalf of the Court, the petitioner attempted to present any "triable issue of fact" that would justify a hearing. On the contrary, petitioner, apart from seeking to disqualify the Appellate Division justices as "interested" parties, sought merely to have the charges dismissed "as a matter of law" as being "inadequate" (21a).

(5)

Since the petitioner has an appropriate forum (the New York Court of Appeals) available to which he can present his various legal contentions, we shall not here enter into any discussion of the validity of his First Amendment or "bad faith" (p. 9) assertions. To preserve, however, our right to present to this Court, in the event certiorari is granted, our position on that issue as well as upon the issue of whether the respondents were suable as a "person" within the meaning of 42 U.S.C. § 1983, we simply note here that, in such event, we shall contend not only that petitioner's First Amendment rights were not invaded by the disciplinary charges; and that the charges (made in good faith) do not and did not preclude criticism of judicial operations or administration or "chill" such criticism, when appropriately made; but, in addition, that the District Court's ruling on the subject of jurisdiction was correct insofar as it held (although not sustained by the Second Circuit) that the Appellate Division (or all of its Justices, even though individually named as persons instead of as a "Court") was not subject to a suit as a "person" within the meaning of the Civil Rights statute. *Cf. Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 401 U.S. 154, 158, footnote 9 (1971) where we had not pressed this jurisdictional point upon our motion to affirm and this Court did not further pursue the jurisdictional question.

CONCLUSION

Since the New York Court of Appeals is available to review petitioner's claim that his First Amendment rights have been violated and since it has not yet passed upon his other claims of error (which involve state, rather than federal law, particularly on the subject of the reviewability of all aspects of his censure order), that Court should be allowed to express its views upon the petitioner's claims. If petitioner does not take advantage of his opportunity to obtain state court review, his petition should, in any event, be rejected.

The petition for certiorari should be denied.

Dated: New York, New York, July 19, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
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of Counsel

APPENDIX

For the Court's convenience and to make explicit the terms of the New York Appellate Division order as to the issues there raised by the petitioner, we annex hereto a copy of that Court's order, entered July 13, 1972:

> At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 12th day of June, 1972.

Present: Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Ellis J. Staley, Jr.,
Hon. Louis M. Greenblott,
Hon. Lawrence H. Cooke,
Hon. Richard D. Simons,
Associate Justices.

In the Matter of Martin Erdmann, an Attorney,

Respondent,

Justices of the Appellate Division First Department,

Petitioners.

The Justices of the Appellate Division First Department having filed a petition containing charges of professional misconduct against Martin Erdmann, who was admitted to the Bar by the Appellate Division First Department on March 11, 1940, and said proceeding having been transferred to this Department;

Now, on reading and filing the petition verified June 8, 1971; respondent's answer verified November 3, 1971; papers in support of respondent's motion for a bill of particulars; the decision of this Court dated January 14, 1972, which granted in part the motion for a bill of particulars; papers in support of petitioners' motion, returnable March 27, 1972, for an order sustaining the petition and charges; papers in support of respondent's cross motion to dismiss the petition and charges, to disqualify the justices of all Appellate Divisions, and to open and make public all prior and further proceedings; the affidavit of William Leibovitz sworn to March 21, 1972; the affidavit of Martin Erdmann sworn to March 21, 1972; affirmation by Daniel Shientag, dated March 27, 1972; and the Court having rendered a decision and *Per Curiam* opinion in which Herlihy, P.J., Staley, Jr., and Reynolds, JJ., concur, with Greenblott and Simons, JJ., dissenting in an opinion by Greenblott, J., it is

ORDERED that petitioners' motion be and hereby is granted and respondent, Martin Erdmann, be and hereby is censured; and it is further

ORDERED that respondent's cross motion to dismiss the petition and charges and to disqualify the justices of all Appellate Divisions be and hereby is denied and that said cross motion, insofar as it seeks to open and make public all prior and further proceedings herein, be and hereby is granted.

ENTER:

/s/ JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: July 13, 1972

A TRUE COPY:

JOHN J. O'BRIEN

CERTIORARI DENIED